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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1060

VILLAGE BOOKS, INC., ET AL.,
Petitioners,

v.

ARTHUR MARSHALL, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition For Writ of Certiorari to the Court of Appeals of Maryland is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion of the Court of Appeals of Maryland on October 13, 1971, No. 37, Sept. Term, 1971, 263 Md. 76, 282 A.2d 126, cert. granted by the Supreme Court of the United States. Judgment vacated June 25, 1973, and cause remanded for further consideration in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), and its companion

cases; judgment reinstated and reaffirmed by Order of the Court of Appeals of Maryland on October 10, 1973.

JURISDICTION OF THE COURT

Respondent admits that this Honorable Court has jurisdiction over the petition sought by Petitioners.

QUESTIONS PRESENTED FOR REVIEW

I. Is the statute, art. 27, §§ 418 and 418A, MD. ANN. CODE, unconstitutional?

II. Are the five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," obscene in the constitutional sense without the Maryland Code specifically defining "obscenity"?

III. Is Prince George's County, Maryland, the proper community to be considered in determining whether or not books and magazines exceed contemporary community standards of candor in the expression of sexual matters in erotic literature, or is proof of a state-wide or national community standard mandatory?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners allege that the First and Fourteenth Amendments to the Constitution of the United States of America are involved.

STATEMENT OF THE CASE

The State's Attorney for Prince George's County, Arthur A. Marshall, Jr., brought an action against Petitioners, Village Books, Inc., and Gary Wahl, under MD. ANN. CODE art. 27, § 418A (Petitioners' App. 23a, 24a and 25a), which provide that the State's Attorney may seek injunctive relief

against any person, firm, or corporation who sells or is about to sell obscene material.

An amendment to the pleadings resulted in the State's Attorney introducing into evidence without objection twenty-one magazines which were marked "Plaintiff's Exhibits Nos. 1-21." These exhibits were received by the court. The State alleged that each publication was obscene under the Maryland statute and was not protected by the First Amendment to the United States Constitution. After the State had introduced the exhibits into evidence and it was stipulated that they were included in the material which Petitioners would be selling at their adult book store in Prince George's County, the State rested. Petitioners moved the Court to dismiss the complaint, and the motion was denied.

Petitioners called two witnesses, one of whom was a psychiatrist who was tendered as an expert in psychiatry. He testified that he did not believe that any of the material was "necessarily an appeal to the prurient interest." The second witness was a man who was in the business of distributing this type of material, and he went through the list of the twenty-one exhibits and gave the numbers of copies that were originally printed, which ranged from five thousand up to more than twenty thousand.

During the argument by Petitioners, the State agreed that it was relying on the fact that the twenty-one exhibits were hard-core pornography and that, as a result, their distribution could be restricted by criminal or civil proceedings. Also, during the argument, Petitioners were asked, "You are claiming these Supreme Court cases [*Redrup v. New York, Austin v. Kentucky, Gent v. Arkansas*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) (consolidated); and *Bloss v. Dykema*, 398 U.S. 278, 26 L. Ed. 2d 230, 90 S. Ct. 1727 (1970)] that you have cited, in effect,

hold that hard-core pornography is protected by the First Amendment and therefore not illegal under any kind of statute unless it involves the pandering aspect of *Ginzburg* [*v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966)] or the juvenile aspects of the other *Ginsberg* [*v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968)] case," to which counsel for Appellant replied, "Yes, sir. Since *Redrup* that is the position as far as the Supreme Court cases and the cases which I cited to Your Honor which were three-judge United States District Courts."

The Court then took the case under advisement and on February 8, 1971, rendered its opinion, holding that eighteen of the twenty-one books were obscene in that they were hard-core pornography, and no expert testimony was required as to Exhibits Nos. 1-12, 16, and 17-21. The Court concluded that the impression of obscenity was so strong that expert testimony to support this impression was unnecessary, and if there were expert testimony to the contrary, it simply could not be given enough weight to overcome the strong impression that it was obscene.

In assaying the presence of the three elements — namely, that the dominant theme of the material taken as a whole appeals to a prurient interest in sex, the material is patently offensive because it affronts the contemporary community standards relating to description and representation of sexual matters, and the material is utterly without redeeming social value — the Court found that the dominant theme of Exhibits Nos. 1-11 appealed to the prurient interest in sex generally because they involved nude males and nude females with genitals fully exposed. No. 12 depicted males in various acts of masturbation, and, with the exceptions of Nos. 13, 14, and 15, the remaining exhibits, Nos. 16-21, clearly defined deviant sexual groups, namely, male homosexuals; that, with

the exceptions of Nos. 13, 14, and 15, all twenty-one exhibits were patently offensive and affronted the contemporary community standards, i.e., the same community from which jurors would be drawn to decide any factual issues involved in any case before the Court, namely, Prince George's County; and finally, although in some of the exhibits there was some printed material in addition to the photographs, the Court was unable to find that the printed material had any redeeming social value whatsoever and, in fact, found that it had an exacerbating effect on an appeal to the prurient interest rather than any redeeming effect and that it was neither artistically, scientifically, nor literarily of any redeeming value whatsoever.

On March 3, 1971, Petitioners appealed the decision of the lower court to the Court of Appeals of Maryland. That Court, on October 13, 1971, filed its opinion (263 Md. 76, 282 A.2d 126) in which it held that § 418A of art. 27, MD. ANN. CODE, was constitutional in that, except in irrelevant detail, it was a carbon copy of the New York Statute, § 22-a of the New York Code of Criminal Procedure, which had been held to be constitutional by this Honorable Court in *Kingsley Books v. Brown*, 354 U.S. 436 (1957). The Court of Appeals of Maryland also found that the five books and magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," were obscene and were hard-core pornography, the distribution of which could be restricted within the framework of the Constitution of the United States. As to the five books enumerated above, the Court of Appeals of Maryland affirmed the decision of the lower court.

Petitioners prayed this Honorable Court to issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland entered in the above-entitled case on October 13,

1971. This Honorable Court, on June 25, 1973, granted the petition for a writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973), and its companion cases, decided June 21, 1973. The Court of Appeals of Maryland, on October 10, 1973, reaffirmed its previous decision of October 13, 1971. On January 7, 1974, Petitioners prayed this Honorable Court to grant a writ of certiorari to review the decision of the Court of Appeals of Maryland; and this Honorable Court, on February 22, 1974, requested Arthur Marshall, Jr., State's Attorney for Prince George's County, Respondent, to reply to that petition.

ARGUMENT

I.

MD. ANN. CODE ART. 27, §§ 418 AND 418A ARE CONSTITUTIONAL.

In *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 2613 (1973), this Honorable Court quoted from *Roth v. United States*, 354 U.S. 476, 484-85, 77 S. Ct. 1304, 1309, 1 L. Ed. 2d 1498 (1957), as follows:

> "We hold that obscenity is not within the area of constitutionally protected speech or press,"

and stated, 93 S. Ct. at 2614-15:

> "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. . . . We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, 390 U.S. [676], 682-85, 88 S. Ct. [1298], 1302-1305 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also

be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value. [Citations omitted; footnote omitted.]

"6. See, *e.g.*, Oregon Laws 1971, c. 743, Art. 29, §§ 255-262, and Hawaii Penal Code, Tit. 37, §§ 1210-1216, 1972 Hawaii Session Laws, pp. 126-129, Act 9, Pt. II, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

"We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v. 12-200 Ft. Reals Film, ... U.S. ....., p. ....., n. 7, 93 S. Ct. 2665, p. 2670, n. 7, 36 L. Ed. 2d ..... (1973)."

Over the years the appellate courts of Maryland have construed the meaning of obscenity as contained in the Maryland statutes. In 1965 the Court of Appeals of Maryland, in *Dunn v. Maryland Board of Censors*, 240 Md. 249, 254-55 (1965), said:

"We hold that the right and power of the [Maryland Board of Censors] to ban films as 'obscene' or as tending 'to debase or corrupt morals' under Sec. 6 of Art. 66A extends only to motion pictures which are obscene under the *Roth* test referred to and paraphrased in *Trans-Lux* [*Distributing Corporation v. Maryland State Board of Censors*, 240 Md. 98 (1965)] and in this decision. . . .

". . .

". . . We think it plain that save in the rare case where there could be no doubt that the film is obscene the

> Board will not meet the burden of persuasion imposed on it by the Constitution and the statute without offering testimony that the picture is obscene in that (a) the average person, applying community standards, would find that its dominant theme, taken as a whole, appeals to prurient interest, (b) that the film goes substantially beyond customary limits of candor in description or representation of sex or other matters dealt with, and (c) that it is subject to proscription because it is utterly without redeeming social importance considered in light of the fact that '* * * sex and obscenity are not synonymous,' *Roth*, 354 U.S. 476, 487, 1 L. Ed. 2d 1498, 1508, and the fact that material dealing with sex in a manner that advocates ideas or has literary, scientific or artistic value or any other form of social importance may not be branded as obscenity."

In *Sanza v. Maryland Board of Censors*, 245 Md. 319, 338-39, 226 A.2d 317 (1967), the Court of Appeals of Maryland, speaking of MD. ANN. CODE art. 66A, § 6 (1957), which provided that the Maryland Board of Censors should disapprove such films as are obscene, stated:

> "The only valid standard for disapproval of a film under the Act, therefore, is obscenity. As *Dunn* [*v. Maryland Board of Censors, supra*] makes clear, that standard is limited to what can be deemed obscene in the constitutional sense. The term is not susceptible of definition, any more than is the loftier concept of due process of law, but it is an inherent part of our system of constitutional government that broad concepts take on definite meaning only as the ground covered by the concept is marked out case by case. . . .
>
> ". . .
>
> "Section 6(a) of the Act states that the Board shall disapprove such films 'as are obscene.' The other reasons for disapproval which follow are stated in the disjunctive. Section 6(b) deals with what films are to be considered obscene. While some of the criteria which follow are impermissibly vague, the legislative intent to authorize

the Board to disapprove films which are obscene by any valid test seems clear. In the recent cases before us, the Board has demonstrated that, in practice, the 'obscene' standard of Section 6 can be treated as severable by limiting its findings of obscenity in accordance with the *Roth-Alberts* criteria, as the Board understands them."

Prior to stating this, the Court of Appeals of Maryland had stated, at 326-27, as follows:

"The *Roth-Alberts* test of obscenity, *Roth v. United States*, 354 U.S. 476 (1957), reiterated in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), is summarized in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General* (the 'Fanny Hill' decision), 383 U.S. 413, 418, 16 L. Ed. 2d 1, 5-6 (1966) as follows:

> 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.' "

On June 6, 1969, the Court of Appeals of Maryland, in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179, 182-83, stated as follows:

"Our definition of obscenity — the *Roth-Alberts* test — was restated with somewhat different emphasis perhaps, by the Supreme Court in *A Book Named 'John Clelands' Memoirs of A Woman of Pleasure' v. Attorney General*, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1, 5-6 (1966), hereinafter referred to as Memoirs,

in which Mr. Justice Brennan, for the Supreme Court, stated:

> 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'
>
> "We recognized and applied this latest statement of the applicable rule in *Sanza v. Maryland State Board of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320-21 (1967), in which we sustained the Circuit Court and the Board in their finding that certain films, shown in an arcade in 'the Block' in Baltimore, were obscene."

The above definition in Maryland of "obscenity" was reiterated in *Wagonheim v. Maryland State Board of Censors*, 255 Md. 297, 304-05 (1969), on October 22, 1969.

In *Hewitt v. Maryland State Board of Censors*, *supra* at 196-97, the Court of Appeals of Maryland took the opportunity to define what that court considered to be "hard-core pornography," as follows:

> "In our opinion, the most apt definition of 'hard core pornography' we have seen is that given by Judge Fuld of the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N.Y.2d 578, 216 N.Y.S. 2d 369, 175 N.E.2d 681 (1961), cited with approval by the Court of Special Appeals in *Levin v. State*, 1 Md. App. 139, 145, 228 A.2d 487, 489 (1967), *cert. denied*, 389 U.S. 1048, 88 S. Ct. 767, 19 L. Ed. 2d 840 (1968):

> 'It [hard core pornography] focuses predominantly upon what is sexually morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification. Recognizable "by the insult it offers, invariably, to sex, and to the human spirit" * * *, it is to be differentiated from the bawdy and the ribald. Depicting dirt for dirt's sake, the obscene is the vile, rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, * * * "a debauchery of the sexual faculty." ' (9 N.Y.2d at 587, 216 N.Y.S.2d at 376, 175 N.E.2d at 686)."

On February 9, 1971, one day after Judge Powers rendered his opinion in which he held that eighteen of the twenty-one books were obscene, the Court of Special Appeals of Maryland rendered its decision in *Woodruff v. State*, 11 Md. App. 202 (1971), where it set forth what at that time the courts of Maryland had construed to be the definition of "obscenity" in MD. ANN. CODE art. 27, §§ 418 and 418A. Judge Moylan, speaking for the Court, stated, at 205:

> "It is also clear that the courts, trial and appellate, of this State are bound by the definition of obscenity as enunciated by the Supreme Court of the United States and that the Maryland Legislature intended by its use of the word 'obscene' to connote that which the word 'obscene' means in prevailing leading legal thought. *Donnenberg v. State* [1 Md. App. 591], at 597, and *Levin v. State* [1 Md. App. 139], at 143. That a state legislature's or state court's definition of 'obscene' may not be broader than that constitutionally permitted by the First and Fourteenth Amendments was made clear in *Mishkin v. New York*, 383 U.S. 502, 507-508:
>
> > 'States are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition, which restrict the regulation

of the publication and sale of books to that traditionally and universally tolerated in our society.' "

The court, in that opinion, went on to say, at 214-15:

"The standard we are to apply was recited initially in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, reiterated in *Jacobellis v. Ohio* [378 U.S. 184], elaborated in *Ginzburg v. United States* 333 U.S. 463, adjusted in *Mishkin v. New York* [383 U.S. 502], and summarized in *A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General* (the *Fanny Hill* decision), 383 U.S. 413. (Hereinafter, this entire formula will be referred to simply as the *Roth* test.) *Dillingham v. State* [9 Md. App. 669]; *Lancaster v. State* [7 Md. App. 602]; *Donnenberg v. State* [1 Md. App. 591]; *Levin v. State* [1 Md. App. 139].

To come within the definition of obscenity, under that standard:

'Three elements must coalesce; it must be established that:

1) The dominant theme of the material taken as a whole appeals to a prurient interest in sex.
   a) where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group.
2) The material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters.
3) The material is utterly without redeeming social value.

Each of the above three federal constitutional criteria must be applied independently and neither be weighed against nor canceled by any of the others.

a) As an aid to determining the question of obscenity, the setting in which the material was presented may be considered. Thus evidence of pandering — "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest — is relevant" and "where a purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation on its face value." ' *Dillingham v. State, supra* 672."

Thus it is evident that at the time Petitioners' case was heard in Prince George's County, and decided on appeal by the Court of Appeals of Maryland on October 13, 1971, the appellate courts of the State of Maryland not only had fully defined and construed the meaning of the word "obscene" within the provisions of MD. ANN. CODE art. 27, §§ 418 and 418A, but also had described what "hard-core" pornography was within the State of Maryland. It is true that the Court of Appeals of Maryland had established within the State a definition of obscenity which contained three elements, all three of which had to coalesce. These were (1) that the dominant theme of the material taken as a whole had to appeal to a prurient interest in sex, and (2) that the material had to be patently offensive because it affronted the contemporary community standards relating to the description or representation of sexual matters, and (3) that the material was utterly without social value. This was the test applied by the Court of Appeals of Maryland in *Village Books, Inc., et al. v. State's Attorney for Prince George's County*, 263 Md. 76 (1971). By the use of this definition of obscenity, the Court of Appeals of Maryland determined Exhibits Nos. 8, 12, 13, 15, and 17 to be hard-core pornography and obscene (263 Md. at 89-90). That determination at that period of time in the appellate court's definition of obscenity,

as determined by its interpretation of the Supreme Court decisions applicable at that time, included a requirement that the material be "utterly without redeeming social value," which requirement was later found by this Honorable Court, in *Miller v. California, supra*, to be not required.

In both *Miller v. California, supra*, and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S. Ct. 2628 (1973), a civil proceeding under a Georgia statute which permitted the enjoining of the exhibition of materials found to be obscene, a provision similar to that of MD. ANN. CODE art. 27, § 418A, this Honorable Court stated that the definition of "obscenity" could be either specifically provided by the state statute or as construed by the state courts. The Maryland appellate courts have construed what "obscenity" means within the State since *Miller*. In *Ebert v. Maryland State Board of Censors*, 19 Md. App. 300, 314-15 (1973), the Court of Special Appeals of Maryland stated:

> "The Supreme Court having jettisoned the Memoirs formulation of the *Roth* standard of obscenity, it is no longer a valid test for this State to follow. We discard it as burdensome, unworkable and unwanted. We turn to *Miller* and its siblings for the current standard of obscenity, and construe 'obscene' as used in Art. 66 A in the light of those cases, not merely because the Supreme Court has said it is prepared to do so with respect to federal statutes, *12 200-Ft. Reels, supra*, and not merely because it has indicated the States are free to do so with respect to State statutes, *Miller, supra*, but primarily because the Court of Appeals of Maryland has declared that it is clear that the legislative intent was to authorize the Board to disapprove films which are obscene by any valid test.' *Sanza v. Maryland Board of Censors, supra*, at 339. We therefore construe the statute as commanding the Board to disapprove any film or view which:
>
> (1) portrays sexual conduct in a patently offensive way in that it contains patently offensive:

(a) representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated; OR

(b) representations or descriptions of masturbation, excretory functions, and lewd exhibitions of genitals; AND

(2) taken as a whole:

(a) would be found by the average person, applying contemporary community standards of the State, to appeal to the prurient interest in sex; AND

(b) does not have serious literary, artistic, political, or scientific value." (Footnote omitted.)

When this Honorable Court granted the certiorari previously asked by Petitioners and remanded the case to the Court of Appeals of Maryland for further consideration in light of *Miller v. California, supra*, this Honorable Court was not disapproving MD. ANN. CODE art. 27, §§ 418 and 418A but, rather, was returning the case to the Court of Appeals of Maryland to determine whether the applicable Maryland law, as written or authoritatively interpreted by the Maryland courts, met the First Amendment standards set forth in *Miller v. California*, 93 S. Ct. at 2614-16, and *Paris Adult Theatre I v. Slaton*, 93 S. Ct. at 2642. Upon receipt of this case by the Court of Appeals of Maryland, that court reviewed the case in light of the decisions in *Miller* and its siblings and reaffirmed its previous decision. By its action, the Court of Appeals of Maryland tested the material under the standards laid down in *Miller* as they differ from the *Roth-Alberts* test previously applied in the State. The appellate courts in Maryland have already reiterated that the definition of "obscenity" was that set forth by the Supreme Court of the United States, and hard-core pornography that set forth by Judge Fuld of the Court of Appeals of New York.

The Court of Appeals of Maryland, by reaffirming its previous decision, tested the materials contained in Exhibits Nos. 8, 12, 13, 15, and 17 under the criteria set forth in *Miller v. California, supra,* and found them to be "obscene" under that test. As a result of that decision, the Court of Appeals of Maryland specifically construed MD. ANN. CODE art. 27, §§ 418 and 418A, and especially the word "obscene" to be that as set forth in *Miller v. California.* The Court of Special Appeals of Maryland has since fully set forth in *Ebert v. Maryland State Board of Censors, supra,* a full construction of the meaning of "obscenity" within the tenets set forth in *Miller.*

The Maryland statute, art. 27, §§ 418 and 418A, having thus been construed and specifically defined by the appellate courts of Maryland within the limits set forth in *Miller v. California, supra,* are therefore constitutional.

II.

THE FIVE MAGAZINES, "SEX CONFIDENTIAL," "MASTURBATION AND YOUTH," "AUTO FELLATIO AND MASTURBATION," "TED AND BLAIR," "ALLEN AND JIM," ARE OBSCENE IN THE CONSTITUTIONAL SENSE.

The five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," are obscene in the constitutional sense because, although the Maryland Code does not specifically define "obscenity," the appellate courts of Maryland have judiciously construed "obscenity."

In remanding the present case to the Court of Appeals of Maryland, this Honorable Court returned all cases which had not reached final adjudication for reexamination in light of its clarification of the previous standards as to obscenity and its declaration of new standards, as set forth in *Miller v. California, supra,* and its sibling cases.

The Court of Appeals of Maryland had already previously determined that the five magazines, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim," Exhibits 8, 12, 13, 15, and 17, were hard-core pornography and that the particular magazines pertained to sexual matters. By using the *Roth-Alberts* definition of obscenity, the Court of Appeals had determined that, as to each of the magazines, the average person, applying contemporary community standards, would find that the dominant theme of the material taken as a whole appeals to the prurient interest, that the material was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters, and that the material was utterly without redeeming social value. The appellate courts of Maryland had previously stated that the word "obscene," as used in the Maryland criminal statute, referred to that which was obscene in the constitutional sense. *Dunn v. Maryland Board of Censors, supra.* Until *Miller v. California*, what was obscene in the constitutional sense was determined by the *Roth-Alberts* test as set forth by the Court of Appeals of Maryland. The Court of Appeals of Maryland consistently applied the *Memoirs* formulation of the *Roth-Alberts* test. It should be noted that Section 311(a) of the California Penal Code, which this Honorable Court was determining in *Miller v. California, supra*, defined the word "obscene" as follows:

> " 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." *Miller v. California, supra* at 2611, n. 1.

This definition in California by statute, had been established in Maryland by the opinions of the highest court of the State, the Court of Appeals of Maryland. The return of the case by this Honorable Court to the Court of Appeals of Maryland required the Court of Appeals to test the five magazines under the *Miller* definition of obscenity in addition to the definition set forth in the *Roth-Alberts* test, as added to by the *Memoirs* test. This is true, as witnessed by the fact that in *Miller v. United States, supra*, this Honorable Court vacated and remanded the conviction for reconsideration in light of the *Miller* series of opinions. The injunction had been under a definition of obscenity using the *Memoirs* standard. The Court of Appeals of Maryland, therefore, in affirming its previous decision, considered the question of obscenity *vel non* and applied the *Miller* standard. Petitioners were therefore given the benefit of the *Miller* standard as well as that of the *Roth-Alberts Memoirs* standard. Consequently, the Court of Appeals of Maryland has construed obscenity in light of the guidelines set down in *Miller v. California, supra*, and using the *Miller* test found that the five magazines — *i.e.*, "Sex Confidential," "Masturbation and Youth," "Auto Fellatio and Masturbation," "Ted and Blair," and "Allen and Jim" — were obscene under the statutes of Maryland.

III.

PRINCE GEORGE'S COUNTY, MARYLAND, WAS THE PROPER COMMUNITY TO BE CONSIDERED IN DETERMINING WHETHER OR NOT THE BOOKS AND MAGAZINES EXCEEDED CONTEMPORARY COMMUNITY STANDARDS IN EXPRESSION OF SEXUAL MATTERS IN EROTIC LITERATURE.

Mr. Chief Justice Burger, in *Miller v. California, supra* at 2618-20, said:

> "When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,'

it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate fact-finders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility.

". . .

"It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S. 502, 508-509, 86 S. Ct. 958, 963, 16 L. Ed. 2d 56 (1966), the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one." (Citations omitted.)

The reasons given in *Miller* for holding that national standards are not constitutionally required in obscenity cases, and upholding the instructions of the trial judge in using the State of California as the community, do not say that one cannot use the standards of the local community to determine the community standards set forth in *Miller*. The State of Maryland comprises communities with a vast diversity of life styles. Materials which do not offend the community standards of our metropolitan areas might well be regarded as obscene by the standards of some of our rural communities. Moreover, Maryland juries have tradi-

tionally relied on the local rather than state-wide community standards. Since the decision in this case, the Court of Special Appeals of Maryland, in *Ebert v. Maryland State Board of Censors, supra*, has determined that the Maryland statute should be construed so that the material, taken as a whole, in order to be found obscene would have to be found by the average person, applying contemporary community standards of the State, to appeal to prurient interest in sex, as well as the other conditions, which must coalesce. At the time of the initial decision in Prince George's County, the community standard which was to be considered had not been defined by this Honorable Court nor by the highest court of Maryland. It was therefore proper for Judge Powers, in determining the community standards which were to be used, to use the community standards of Prince George's County, Maryland, which was the location where the magazines were to be sold and distributed. As stated in *Miller v. California, supra*, it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City. It is also neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Prince George's County accept public depiction of conduct found tolerable in Baltimore City. People in different areas vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. By applying the Prince George's County community standard, the court was able to judge these magazines by the impact that they would have on the average person in the community where these magazines were to be sold and distributed. The court therefore did not violate the First Amendment to the Constitution of the United States by using the community standards of Prince George's County.

CONCLUSION

The State of Maryland, by its judicial construction of MD. ANN. CODE art. 27, §§ 418 and 418A, has defined the use of the word "obscene" to mean obscenity as set forth by the Supreme Court of the United States. Prior to *Miller v. California, supra*, the judicial construction given in the State was that of *Miller-Alberts Memoirs* test, which included utterly without redeeming social value. Since *Miller*, the judicial construction within the State of obscenity is that which conforms to that given in *Miller*. As stated in *Miller*, so long as the criteria used in determining obscenity within the state courts is limited within the guidelines set forth in *Miller*, then that determination by the state courts does not violate the First Amendment to the Constitution of the United States. Obscenity is not protected within the provisions of the First Amendment and therefore is not protected within the states by the Fourteenth Amendment.

The Court of Appeals of Maryland, in affirming its previous decision in *Village Books v. State's Attorney for Prince George's County, supra*, judicially construed "obscene" to mean henceforth that which was set forth in *Miller* and, using that test, found that the five magazines were obscene within the *Miller* definition. This afforded Petitioners not only the advantages of the *Roth-Alberts Memoirs* test, which it had previously used in its original decision, but also, by its use of the new *Miller* guidelines in its affirmance, gave to the individual Petitioner the advantages of those guidelines in *Miller* which would be most advantageous to Petitioners' cause. Thus, Petitioners have the best of both worlds.

Miller v. California, supra, while authorizing the use of state community standards in determining what is or is not obscenity to the average individual, and denying the use of a national standard, did not deny the use of a local standard.

The purpose of using the community standard was because people in different states vary in their tastes and attitudes and the diversity was not to be strangled by the absolutism of imposed uniformity. As the court stated in *Miller*, the triers of fact are the best individuals to draw on the standards of their communities and to be guided always by limiting instructions on the law. What better community standard to use in this case than the area from whence the jurors are to be drawn, namely, Prince George's County. The holding in *Miller* that the community standards of the State of California, as opposed to national standards, were constitutionally adequate to establish whether a work was or was not obscene did not mean that the contemporary community standards of the circuit wherein the case was being tried — here, Prince George's County — were not constitutionally adequate to meet the *Miller* test for obscenity.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the Court of Appeals of Maryland should not be granted.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
JOHN P. STAFFORD, JR.,
Assistant Attorney General
of Maryland,
For Respondent.